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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR PETITIONER

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Petition For Certiorari Filed October 3, 1983
Certiorari Granted December 5, 1983

QUESTIONS PRESENTED

1. Whether "medical treatment" such as clean intermittent catheterization is a "related service" required under the Education for All Handicapped Children Act and, therefore, required to be provided to the minor Respondent.

2. Is a public school required to provide and perform the medical treatment prescribed by the physician of a handicapped child by the Education of All Handicapped Children Act or the Rehabilitation Act of 1973?

3. Whether the Fifth Circuit Court of Appeals misconstrued the opinions of this Court in *Southeastern Community College* v. *Davis*, *Pennhurst State School & Hospital* v. *Halderman*, and *State Board of Education* v. *Rowley*.

TABLE OF PARTIES BELOW

This Petition is submitted on behalf of the Irving Independent School District and its Board of Trustees. The parties below are as follows:

HENRI AND MARY TATRO, Individually and as Next Friend of Amber Tatro, a Minor,
Plaintiffs-Appellees
Cross-Appellants

THE STATE OF TEXAS, TEXAS EDUCATION AGENCY,
Defendants

STATE BOARD OF EDUCATION AND ITS MEMBERS: Elizabeth Armstrong, James M. Binion, Joe Kelly Butler, W. W. Carter, Don H. Cook, Brian Crouch, Jimmy L. Elrod, W. H. Fetter, Wayne Frederick, Joseph C. Gathe, E. R. Gregg, Jr., Rubin E. Hinojosa, Jim Hollingsworth, William N. Kemp, Mary Ann Leveridge, Paul Matthews, Rex Reddell, William P. Sarsgard, Richard Tencinte, Laura Tynes, Marjory Vickery, James H. Whiteside; ALTON BOWEN, COMMISSIONER OF EDUCATION,
Defendants-Appellants

THE IRVING INDEPENDENT SCHOOL DISTRICT, ITS BOARD OF TRUSTEES: Roger Hill, Robert Pierce (no longer on Board), Anne Pfaff, Vickie Tatum, Troy Kelley, Pat Norman, John Stipes; James W. Fillbeck has now replaced Robert Pierce on the Board,
Defendants-Appellants
Cross-Appellees

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 703 F.2d 823. The opinion of the Federal District Court for the Northern District of Texas is reported at 516 F.Supp. 968. These opinions and the judgment of the District Court are reprinted in the Appendix to the Petition for Writ of Certiorari and appear at pages 64a to 83a and pages 1a to 53a, respectively. The memorandum opinion of Judge Higginbotham (unpublished) and the amended judgment of the Federal District Court are reprinted in the Appendix to the Petition for Writ of Certiorari and appear at pages 55a to 61a and pages 62a to 63a, respectively. The opinion below is the second opinion in this case. The first opinion of the Court of Appeals

(hereafter "Tatro I") is reported at 625 F.2d 557 (1980). The opinion of the Federal District Court for the Northern District of Texas in *Tatro I* is reported at 481 F.Supp. 1224 (1979). These opinions are reprinted in the Appendix to the Petition for Writ of Certiorari and appear at pages 94a to 109a and pages 86a to 93a, respectively.

JURISDICTION

This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on April 25, 1983. A timely Motion for Rehearing and Suggestion for Rehearing En Banc was denied on July 5, 1983. The Petition for Writ of Certiorari was filed on October 3, 1983, and was granted by the Court on December 5, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are as follows:

The Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (1976):

Section 1401—Definitions

Section 1415—Procedural Safeguards

The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.:

Sections 794-794a

State Statutes:

Article 4495(b) § 3.06(d)(1)

Tex. Rev. Civ. Stat. Ann. (Vernon Supp. 1982-83)

The pertinent text of the above statutes is set forth in the Appendix to the Petition for Writ of Certiorari and appears at pages 110a to 113a.

STATEMENT OF THE CASE

In May of 1979, Amber Tatro was 3½ years old. She was presented by her mother to the Irving Independent School District for educational evaluation and assessment as a handicapped student with the request she be placed in the Irving Independent School District's early childhood development class. The School District's early childhood development program is for developing skills necessary to be able to learn when the child enters school; and to be eligible for the program, the child must be educationally handicapped and eligible for special education. (R. Vol. 4 p. 318) (Pl. Ex. 5a, b, c [testimony of Dr. Bates]; R. Vol. 3 p. 137)

Amber was evaluated and assessed by the School District, the results of which indicated she was eligible for special education because of an orthopedic handicapping condition with some speech impairment. (J.A. 8a) The School District's Admission, Review, and Dismissal Committee ("ARD"), with the participation of Amber's parent(s), developed for Amber an Individual Education Plan ("IEP"). (J.A. 8a) The IEP developed by the ARD Committee included occupational therapy and physical therapy at least twice a week and speech therapy as needed to improve gross and fine motor skills and language skills, respectively. (J.A. 8a) The ARD Committee agreed with Amber's parents that the *most* appropriate placement for Amber was in the District's early childhood development class from 8:30 o'clock, a.m., to 11:15 o'clock, a.m., each school day. (J.A. 61a)

Amber had been diagnosed by her treating physician as having a neurogenic bladder secondary to myelodysplasia, commonly called "spina bifida." A "neurogenic bladder" is a term which refers to a state of damage of the nerves ennervating the bladder which results in a dysfunction of the urinary bladder. Myelodysplasia is a

failure of the normal fetal development of one or more segments of the bony spine and underlying nervous tissue which can result in such problems as hydrocephalus (excessive water pressure on or in the brain tissue) and spina bifida (defects in the posterior portions of the spinal vertebra) with or without associated myelomeningocoela (herneation of the spinal cord and/or nerves through the spina bifida defect with resulting nerve damage). (J.A. 8a) (R. Vol. 3 p. 234)

Amber's bladder dysfunction, a direct and proximate result of her neurogenic bladder, involves an inability to retain urine with resulting symptoms of constant dribbling or intermittent involuntary emptying of the urinary bladder, and an inability to properly empty the bladder producing excessive pressure within the bladder and, subsequently, into the ureters and kidney-collection system. The latter situation generally results, and does with Amber, in symptoms of "overflow" dribbling. These symptoms result in a medical or health hazard of back-pressure effect in the bladder and the recurring or chronic infection of the urinary tract. (J.A. 8a) (R. Vol. 3 p. 234)

Amber's parents insisted the District's ARD Committee provide Amber with "clean intermittent catheterization" ("CIC") for care of Amber's neurogenic bladder because it was recommended by Amber's treating physician. The District's ARD Committee, believing the requested medical treatment procedure of CIC was not required by the Education of All Handicapped Children Act, 20 U.S.C. § 1401 et seq. ("EAHCA"), nor authorized under the laws of the State of Texas, declined to modify Amber's IEP so as to include provisions for administering CIC. (J.A. 7a, 8a, 12a)

Amber's parents disagreed with the decision on the ground that CIC is the medically-accepted treatment of

choice for Amber's neurogenic bladder condition; that it does not have to be personally administered by a licensed physician; that it was necessary for Amber to benefit from special education; and that it was, therefore, a "related service" required to be provided Amber by the School District pursuant to 20 U.S.C. § 1401(17). They appealed the Committee's determination to the State Educational Agency pursuant to 20 U.S.C. § 1415(b)(2), and the state's provisions for hearings and appeals concerning the provisions for a free appropriate public education of handicapped students, because Amber's IEP did not include CIC as a "related service."

Testimony was taken at the hearing from witnesses for the Tatros and for the School District.[1] At the conclusion of the administrative proceedings, the State Board of Education found:

(1) "Amber T. to be orthopedically handicapped, and this entitled her to special education as defined in applicable statutes, guidelines, and regulations."

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[1] The Tatros were represented by counsel throughout the administrative proceedings and by a parent advocate before the ARD Committee. Amber's treating doctor testified at length in the administrative hearing, the substance of which was to the effect CIC was developed in recent years as an alternative to urinary diversion surgery and/or artificial sphincter implantation; that CIC is considered medical treatment of a disease state; that it was the treatment of choice; and that it was not, in any way, related to the care or treatment of her orthopedic handicap. He further testified Amber would have an increased risk to her health without CIC at 3 to 4 hour intervals; that CIC involved risk of septicemia, hemorrage, perforation of the bladder and/or urethra, and infection of the urinary tract. He substantially agreed with the document entered in evidence and entitled "Current Approaches to Urologic Evaluation and Management of Infants and Children with Myelodysplasia." (J.A. 9a, 11a, 12a) (Dft. Ex. 7; R. Vol. 3 p. 393)

(2) "That CIC is medical treatment for a condition resulting from a neurological disorder, and is not connected with or related to Amber T.'s handicapping condition which qualifies her for special education. There is no evidence the neurological disorder adversely affects the educational performance of the Petitioner . . . We, therefore, find CIC is not a service consisting of *specially designed instruction* to meet the educational needs of the Petitioner and thus is not special education . . ." (emphasis added)

(3) "Based on the testimony of Dr. George Hurt and Dr. Richard Bates and the document entitled 'Current Approaches to Urologic Evaluation and Management of Infants and Children with Myelodysplasia,' we find CIC is not a developmental, corrective, or supportive service required to assist the Petitioner to benefit from special education designed to meet the educational needs of her orthopedic handicap; we, therefore, find CIC is not a *related service* as defined by the applicable statutes and regulations." (emphasis added)

(4) "The ARD Committee determined that the child in question qualified for early childhood development because of her orthopedic handicap and would require a program to improve her gross and fine motor skills. The education plan set forth has long-range goals to increase the child's abilities in these areas of development so as to prepare her for her school program when she reached the appropriate age, and to develop the child's self-help and living skills . . . No evidence exists in the record that CIC is, in any way, related to achieving these goals." (P. Ex. 5a, b, c; R. Vol. 3 p. 137)

Having made the foregoing findings, the State Board of Education held:

(1) "Based upon the evidence and foregoing findings of fact, we conclude that CIC is *medical treatment* of a diseased state." (emphasis added)

(2) "Based upon the evidence and foregoing findings of fact, we conclude that the IEP developed by the District's ARD Committee *meets the standards of the state educational agency* and provides the child in question a *free appropriate public education* within the intent and meaning of applicable statutes and regulations." (emphasis added) (Pl. Ex. 5a, b, c; R. Vol. 3 p. 137)

The full text of the State Board's decision is found in the record of the administrative hearings. (Pl. Ex. 5a, b, c; R. Vol. 3 p. 137)

On October 12, 1979, the Tatros commenced an action for injunctive relief and money damages against the State of Texas, the State Board of Education, the Texas Education Agency, the Board of Trustees for the Irving Independent School District, and J. F. Townley, Individually and as Superintendent of the Irving Independent School District. The complaint alleged that the District and the State had failed to provide Amber with a free appropriate public education because the provision of CIC was not provided Amber in violation of the Education of All Handicapped Children Act, 20 U.S.C. § 1401 et seq.; the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.; and the Civil Rights Act, 42 U.S.C. § 1983.

On November 8, 1979, the Tatros amended their complaint adding additional defendants and filed an application for preliminary injunction. On November 15, 1979, prior to all defendants being before the Court, the Tatros filed "Proposed Stipulation of Facts."

On December 21, 1979, the District Court denied the Tatros' application for preliminary injunction and granted Defendant Townley's motion to dismiss. (Pet. App. 86a; *Tatro* v. *Texas*, 481 F.Supp. 1224 (1979), "Tatro I").

The District Court held *related* services required to be provided must be "related" to the special education (Pet. App. 88a), that CIC is required whether or not Amber is attending school (Pet. App. 89a), and that CIC is not any more related to "special education" than other requisites to her existence (Pet. App. 89a). The District Court further found no congressional intent to sweep broadly in its usage of the word "related," instead the Court found that to be related in the statutory sense, the service requirement must arise from the effort to educate (Pet. App. 89a).

In denying relief under the Rehabilitation Act of 1973, specifically, 29 U.S.C. § 794, the Court found the School District's refusing to *affirmatively* provide catheterization was not denying Amber the benefits of, nor effectively excluding Amber from, a federally-funded program. The District Court held the Rehabilitation Act could not be interpreted as requiring a school to furnish catheterization that Amber would need regardless of whether she is taking advantage of any educational programs (Pet. App. 91a). The District Court further held the Tatros could not convert a statute prohibiting discrimination in certain governmental programs to a statute requiring the setting up of governmental health care for people seeking to participate in such programs (Pet. App. 92a).[2]

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[2] The Tatros had asserted no alternative had been given them but for one of them to attend Amber's needs during the school day. The District Court found such assertion to be ambiguous and said, "In

The Tatros appealed. The panel of the Court of Appeals of the Fifth Circuit vacated and remanded (Pet. App. 94a-109a; *Tatro* v. *Texas*, 625 F.2d 557 (J. Goldberg) (1980), "Tatro I"). It said that without the provision of CIC, Amber cannot benefit from special education because without it she cannot be present in the classroom; therefore, CIC is a supportive service required to assist Amber to benefit from special education. The *Tatro I* panel found the District Court erred in limiting the literal words of 20 U.S.C. § 1401(17) and limiting the scope of "related services" to avoid requiring every necessary life-support system be furnished (Pet. App. 104a). The *Tatro I* panel held that the Education of All Handicapped Children Act contained its own limitations on the type of life-support services that must be provided as related services and said, "A life-support service would not be a related service if it did not have to be provided during school hours, but instead could be performed at some other time" (Pet. App. 105a). Further, the Court said, "The life-support service must be one which a nurse or other qualified person can perform. Excluded from the term 'related services' are those health-related activities which must be performed by a licensed physician that are not provided to determine a child's medically related

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light of the complaint, the Plaintiffs' brief taken as a whole, Plaintiffs' proposed stipulation of facts, and a conference held in chambers, the most reasonable interpretation of that assertion is that Amber's participation in the program is conditioned on either her parents or her parents' agents providing catheterization. This is simply the corollary to the decision to not provide CIC to Amber, and is permissible under the Rehabilitation Act." (Pet. App. 92a) The context in which the Court considered the "proposed stipulation of facts" has been overlooked or misapplied by the panel(s) of the Court of Appeals in their subsequent opinions.

handicapping condition which results in the child's need for special education and related services" (Pet. App. 105a).[3]

In holding the School District's failure to provide CIC violated Section 504 of the Rehabilitation Act of 1973, the *Tatro I* panel held the District Court was incorrect in holding the statute prohibiting discrimination could not be converted to a statute requiring setting up of governmental health care for people seeking to participate in certain governmental programs (Pet. App. 107a). The *Tatro I* Court then held Amber had been excluded from the School District's programs by the District's refusal to provide CIC to Amber (Pet. App. 108a).

The decision of the Court of Appeals in *Tatro I* was based on assumed facts with no findings upon which to rely for its review (fn 1 to the Court's Opinion, Pet. App. 95a, 625 F.2d at 558).[4]

On remand, the School District moved to dismiss the complaint on the grounds that the Plaintiffs had failed to name a necessary party, the U.S. Commissioner of Education or the Office of Education; that Plaintiffs had not

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[3] This is the corollary to holding all life support services would be a "related service" if required during school hours. Thus, the Court's example of insulin injections would have to be provided if the doctor prescribed it during school hours, as well as kidney dialysis, to which the Court referred in fn 19 at Pet. App. 108a-198a.

[4] The Fifth Circuit had consistently refused to review cases of such nature because of incomplete and inconclusive record(s) on appeal. Its normal procedure was to vacate and remand for findings of fact and/or further proceedings. *Davis* v. *United States*, 422 F.2d 1139 (5th Cir. 1970) (J. Goldberg); *Echols* v. *Sullivan*, 521 F.2d 206 (5th Cir. 1975) (per curiam); *Mayo* v. *Lakeland Highlands Canning Co.*, (1940) 309 U.S. 310, 316, 60 S.Ct. 517, 520.

invoked the Court's jurisdiction; and that Plaintiffs had failed to state a claim on which relief could be granted. (R. Vol. 1 p. 99) The State Defendants moved to dismiss on the ground that the Plaintiff's suit was barred as to them by the 11th Amendment and the doctrines of judicial and legislative immunity.

The District Court granted the State Defendants' motion to dismiss as it pertains to retrospective relief and denied the motions to dismiss for lack of subject matter jurisdiction, for failure to properly plead federal financial assistance, for failure to state any cause of action under Section 504, and for failure to join indispensable parties. It deferred disposition of the State Defendants' motion to dismiss and the School District's motion to dismiss for failure to state a cause of action for damages under the Education of All Handicapped Children Act, Section 504, or 42 U.S.C. § 1983, and proceeded to trial on the merits. (R. Vol. 1 p. 136)

On May 26, 1981, the District Court issued an order that the State Board of Education and the Irving Independent School District modify Amber's IEP to include the provision of CIC *in accordance with and as prescribed by a valid medical prescription provided by Amber.* The Court also awarded Plaintiffs damages and attorney's fees and expenses in the amount of $28,502.00 (Pet. App. 53a, 54a). The District Court issued two separate opinions stating its findings of fact and conclusions of law (Pet. App. 1a-36a, 516 F.Supp. 968; Pet. App. 55a-61a, unpublished). It amended its judgment awarding damages against the School District, and ordered recovery of attorney's fees from the School District and the State Board of Education, jointly and severally (Pet. App. 62a, 63a). The Court denied all other relief, dismissed the State's Commissioner of Education in his official and indi-

vidual capacity, dismissed the State Board of Education and the District's Board of Trustees in their individual capacities, and dismissed the State of Texas and the Texas State Education Agency (Pet. App. 6a-9a).

The Court held that under state law, the School District *could not* lawfully provide CIC without a valid medical prescription from a licensed physician; that under the Texas Medical Practice Act, the physician may delegate prescribed medical treatment to an individual or an institution; and that, when delegated, the individual or institution may then lawfully perform the medical treatment. Thus, the Court held, the physician may prescribe CIC and delegate to the School District, or its employees, the actual performance of the delegated medical treatment. It further held that the School District must secure the services of persons sufficiently trained so that a treating physician may delegate to them the medical treatment he prescribes (Pet. App. 12a, 13a).

Having concluded the School District and its employees could, therefore, lawfully treat Amber's neurogenic bladder with CIC under Texas law, it proceeded to hold that CIC was a "school health service" as defined at 34 C.F.R. § 300.13(b)(10), and not a "medical service" within the meaning of 20 U.S.C. § 1401(17) or 34 C.F.R. § 300.13(b)(4) (Pet. App. 14a).

The Court said that Amber is not required to accept any risk in order to attend school, and thus found she will require CIC during school hours if she is to attend the District's half-day program. The Court then held that CIC was a "related service" as defined in 20 U.S.C. § 1401(17) "required to assist Amber to benefit from special education" (Pet. App. 15a).

The Court, feeling constrained by *Tatro I*, ordered the District to modify Amber's IEP to include the requested

medical treatment. Although the District Court was not convinced Section 504 of the Rehabilitation Act of 1973 was applicable in view of *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981), *without finding a specific violation of Section 504*, but for reasons of institutional order, it awarded reasonable attorney's fees to Plaintiffs under 29 U.S.C. § 794a(b) (Pet. App. 30a-32a).

The School District and the State Board of Education Appealed. The panel of the Court of Appeals for the Fifth Circuit ("Tatro II") affirmed (Pet. App. 65a-83a, 703 F.2d 823), relying on the panel's decision in *Tatro I* and "law of the case doctrine." Even though the *Tatro II* Court said, "Were we writing on a clean slate, we would share the district court's reluctance to read a statute designed to aid education to require provision of medical necessities of life which are required by a child whether or not she participates in the state's educational program" (Pet. App. 67a), and although it would have taken a different view of EAHCA upon de novo consideration (Pet. App. 68a), it felt constrained to follow *Tatro I*.

A petition for rehearing en banc was denied. A petition for a writ of certiorari was filed on October 3, 1983. Certiorari was granted on December 5, 1983.

SUMMARY OF THE ARGUMENT

The Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (EAHCA), is a funding statute. It did not create a federal right to education nor a federal right to free appropriate medical treatment in order to receive a "free appropriate public education."

That term describes the limitations of the State's undertaking when it submits its plan to the Secretary for the purpose of obtaining his approval as a condition for

federal funds appropriated pursuant to the Act. In accepting federal funds, the states do not undertake to provide particular methods of educating handicapped children.

The State Plan approved by the Secretary does not include provisions for delivery of medical treatment prescribed by a doctor. The State was not aware of any obligation of providing medical treatment as a condition of receiving EAHCA funds, nor did it knowingly accept such a condition. If Congress intended to do so, it did not do so unambiguously.

The District Court and the Court of Appeals should have dismissed the complaint when it was demonstrated the education programs made available by the School District for the education of Respondent met the "standards of the State Educational Agency," and were in conformity with the State Plan approved by the Secretary.

Assuming, arguendo, that there is an enforceable private right to "free appropriate public education," the definition adopted by the Court of Appeals and the District Court of "related services" is not authorized by the Act, is contrary to the statute and Congressional intent, and is incapable of implementation. The District Court erred in looking to the State's Medical Practice Act to define "related services" and "school health services" instead of limiting its inquiry to the definition contained in the Act and the State Plan approved by the Secretary.

The Act's provisions for judicial review do not enlarge the scope of the state's obligations. In finding a potential harmful effect, or risk of injury, if Amber attended the requested and recommended educational setting or placement without the medical treatment prescribed by her doctor, the District Court ordered the School District to modify Amber's IEP to provide for the medical treatment

as prescribed by her personal physician. The Court's finding of a potential harmful effect did not entitle the Court to rewrite the IEP and enlarge the scope of the State's obligations. It could have, and should have, remanded to the local educational agency to place Amber in one of the available alternative placements provided for in the State Plan so Amber could receive the special education contained in her IEP without risk of injury.

The allegations and findings concerning a violation of § 504 of the 1973 Rehabilitation Act arise from the same factual underpinnings as the statutory claim under EAHCA. The Courts below erred in granting any relief under § 504. Where the allegations and facts are the same as those asserting an EAHCA violation, the remedies provided by EAHCA provide the exclusive basis through which to challenge state and local compliance. Further, they would create obligations contrary to the Court's decision in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981) and *Southeastern Community College* v. *Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979).

ARGUMENT

1. The Education For All Handicapped Children Act, 20 U.S.C. § 1401 Et Seq., Does Not Require Petitioner To Furnish Respondent Medical Treatment In Order To Provide Her A "Free Appropriate Public Education."

(a) By denying petitioner's "motion to dismiss" and "requested findings of fact and additional conclusions of law," the courts below have assumed, if not expressly held, 20 U.S.C. § 1412 creates a federal right to medical treatment.

In view of *Pennhurst State School & Hospital* v. *Halderman*, 101 S.Ct. 1531 (1981), the District Court clearly erred in denying Appellant's "Requested

Amended and Additional Conclusions of Law," and in ordering the Appellant to modify Plaintiff's Individual Education Plan to include the medical treatment as prescribed by her personal physician.

EAHCA was enacted by Congress in the exercise of its Spending Power, *Board of Education of the Hendrick Hudson Central School District Board of Education* v. *Amy Rowley*, ___ U.S. ___, 102 S.Ct. 3034 (1982), at 3042, n.11, and 3049, n.26. By accepting the federal funds, the state and local educational agencies enter into an agreement much in the nature of a contract. In return for the funds, "the states agree to comply with federally imposed conditions." *Pennhurst, supra*, at 1539. However, the states must be able to voluntarily and knowingly accept the terms of the "contract."

"There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously." *Pennhurst, supra*, at 1539.

The EAHCA was enacted by Congress for the purpose of assisting the states in providing educational opportunity for each handicapped child, and encouraging innovation and research in the field of special education, *Eberle* v. *Board of Public Education*, 444 F.Supp. 41, 43 (D.Pa. 1977), aff'd 582 F.2d 1274 (3rd Cir. 1978), *Rowley, supra*, at 3037.

Subchapter II, entitled "Assistance for Education of All Handicapped Children," 20 U.S.C. §§ 1411-1420, sets forth the relevant portions of the statute. Section 1412 details what each state must do in order to qualify for federal funds. It only establishes general conditions in order for the state to qualify for the applicable funds.

Specifically, Section 1412 requires a "State Plan," the contents of which are set forth in Section 1413.

The funds provided for under EAHCA are to be used to meet "excess costs," 20 U.S.C. § 1414(a)(1). "Excess costs" are costs over and above the school's average annual per-pupil expenditures.

The "Commissioner" shall approve any "State Plan." He shall disapprove any "State Plan" which does not meet the requirements of § 1413(a) and (b), see § 1413(1).

If the state fails to comply with §§ 1412 or 1413, it is subject to the provisions and sanctions of Section 1416. In this manner, Congress has provided for an enforcement mechanism where a state chooses to avail itself of the funding statute but does not comply with its provisions.

To satisfy eligibility requirements, 20 U.S.C. § 1412(6) requires the state to assure the provisions of Subchapter II are carried out by local educational agencies. The regulations implementing EAHCA require the state to adopt effective procedures for compelling local educational agencies to comply with the "State Plan." Procedures are established for withholding funds to a local educational agency which fails to comply with the "State Plan."

The only rights created by EAHCA on behalf of the Respondent are procedural and those substantive rights to a "free appropriate public education" which are discussed in *Rowley, supra*, at 3041, 3042. Although Section 1415 creates certain procedural rights on behalf of the individual handicapped student, Plaintiffs did not allege, nor did the District Court find, a violation of any of the procedural rights granted by § 1415. Respondents did not complain of the evaluation, nor assert a violation of the State Plan.

Any rights created by § 1415, enforceable against the Petitioner, are limited to a showing Petitioner has violated the "State Plan." This they did not attempt to do. Without a finding that the local educational agency has violated the provisions of the "State Plan" as required by § 1413, any "relief may well be limited to enjoining the federal government from providing funds to the [State]." *Pennhurst, supra,* at 1545 (referring to funding statutes).

The legislative history of the 1975 amendments to the Act clearly reveals the purpose of the statute is to implement the "right to education" previously recognized by the several states, and not a "right to education" recognized by the federal government. Thus, at the time of enactment, the state was providing education for the handicapped and had provided its citizens a "right to education." Congress was only recognizing these efforts by the states and was providing encouragement with financial assistance to the states in promoting their efforts in this regard. It was not creating that which the state had already created.

In attempting to understand Congress' intent in enacting the EAHCA, we must begin by looking at the statute itself. *Cannon* v. *University of Chicago,* 441 U.S. 677, 689; 99 S.Ct. 1946, 1953 (1979). The Court must examine the meaning of the words, and the context in which those words appear. *District of Columbia* v. *Carter,* 409 U.S. 418, 420; 93 S.Ct. 602, 604 (1973).

In *Pennhurst,* the U.S. Supreme Court again looked to this rule of statutory construction:

> "In expounding a statute, we must not be guided by a single sentence, but look to the provisions of the whole law and to its object and policy, *Philbrook* v. *Glodgett,* 421 U.S. 707, 713 (1975), quoting *United*

States v. *Hleis of Boisdorf*, 8 How. 113, 122 (1849)." *Pennhurst, supra*, at 1540.

Having done so, the Pennhurst Court concluded:

> "The legislative history buttresses our conclusion that Congress intended to encourage, rather than mandate, the provision of better services to the developmentally disabled. The House Committee believed the purpose of the Act was simply to continue an existing federal grant program." *Id.* at 1541.

When the meaning of the statutory words is in doubt, the Court may look to the sponsors of the statute. "[A] statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Adm.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 96 S.Ct. 2295, 2304 (1975). In doing so, it becomes clear that the overriding congressional concern was meeting the needs of handicapped children. The elaborate system of procedural safeguards contained in 20 U.S.C. § 1415 was thought to be the best method of assuring appropriate program decisions. Due process hearings were required, said Senator Stafford, to assure that the rights of the children would be protected, 121 Cong.Rec. 37412 (1975). Senator Harrison Williams praised the section because it would "assure that the state and local agencies did not make inappropriate decisions regarding the identification, evaluation, and educational placement of handicapped children." 121 Cong.Rec. 37415 (1975). As the Sponsors interpreted the Act, the rights of handicapped children would be protected by the combined effort of all the procedures contained in Section 1415, including Section 1415(e), because the result would enhance proper evaluation and eduational placement of the child.

Applying these principles, *Pennhurst State School & Hospital* v. *Halderman, supra*, and *Rowley, supra*, to

this case, it is clear Congress enacted the EAHCA only in order to aid the states in educating their handicapped children by providing the necessary funds. For as Congressman Carl Perkins noted, educating handicapped children "created enormous financial burdens for already overburdened local and state educational resources." 121 Cong. Rec. 37025 (1975). The legislative history shows an emphasis on procedural safeguards to assure appropriate placement, a recognition that diagnosis of special educational problems was difficult and uncertain and an awareness of severe budgeting constraints.

By applying the principles learned in *Pennhurst* and *Rowley*, there is nothing in the EAHCA or its legislative history to even suggest that Congress intended to require the states to assume the high cost of providing medical treatment, prescribed by a private physician, for their handicapped students so they can receive a "free appropriate public education." There is even less to support the view that Congress intended that private physicians may obligate the expenditure of massive federal and state funds by merely prescribing medical treatment for their patients and delegating the furnishing of such treatment of their patients to the local public school. One can only conclude, therefore, that whatever Congress intended, it certainly didn't intend for this result to occur.

(b) The definition of "related services" formulated by the District Court and the Court of Appeals is contrary to EAHCA and should be reversed.

(1) Although a definition of a "free appropriate public education," "special education," and "related services" is contained in EAHCA, the Courts below have ignored those definitions and formulated one which is unnecessary, which is contrary to congressional intent, and which is incapable of implementation.

EAHCA defines "related services" to mean:

> "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children." 20 U.S.C. § 1401(17). (Emphasis added.)

The regulations implementing EAHCA expand this definition to include "school health services." 34 C.F.R. 300.13(a). The regulations define "medical services" to mean:

> "services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services," 34 C.F.R. 300.13(b)(4),

and define "school health services" to mean:

> "services provided by a qualified school nurse or other qualified person." 34 C.F.R. 300.13(b)(10).

EAHCA defines "special education to mean:

> "Specially-designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions," 20 U.S.C. § 1401(16).

Taken together, these definitions delineate the scope of education to be provided to handicapped children under EAHCA.

The Court of Appeals and the District Court, on remand, defined "related services" by attempting to choose

between two alternatives, i.e., whether the prescribed medical treatment is a "medical service" or a "school health service." Either result begs the question. The issue is whether EAHCA creates a right to medical treatment at all.

It is not who, under state law, may lawfully administer medical treatment; who may prescribe and delegate it; nor to what extent delivery of the treatment must be supervised, or by whom. It is the nature and purpose of the service which is determinative, not who may be legally authorized to provide it. To find to the contrary is to hold that Congress conditioned the grant of federal funds on the states agreeing to underwrite the massive financial obligations involved in providing all medical treatment physicians may unilaterally choose to prescribe for the more than eight (8) million children with handicapping conditions.

The EAHCA contains its own definition of "related services." "Medical services" are for diagnosis and evaluation purposes only, regardless of who may provide them. Providing for diagnosis and evaluation satisfies, in part, the goals and purposes of EAHCA to provide for identification and evaluation for the some four (4) million handicapped children who Congress found were not receiving any specialized educational services.[5] Congress was obviously not concerned with who the states authorized to provide diagnostic or evaluative services, but only that they be provided.

The District Court believed "the implementing regulations shed a little more light" on the statutory definition of

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[5] This Court discussed these findings and legislative history in *Rowley* at 102 S.Ct. 3045.

"related services" and "medical services." Petitioner submits they do not. The darkness still prevails unless the Court first holds that EAHCA requires the states and local educational agencies to deliver medical treatment.

The interpretation of a statute by the agency charged with its implementation should "shed some light" and may be entitled to some deference if they do. This Court has consistently held, however, that "such deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history," *Teamsters* v. *Daniel*, 439 U.S. 551, 556 n.20, 99 S.Ct. 790, 800 n.20 (1979). Any deference to the subject regulations in this case is further constrained in view of the agency's interpretation of its own regulations.

On January 14, 1981, the former Secretary issued notice of interpretation of the subject provisions (46 F.R. 4912; Jan. 19, 1981). This notice interpreted Part B of the Education of the Handicapped Act and Section 504 of the Rehabilitation Act of 1973 to require public educational agencies to provide CIC as a "related service" to handicapped children entitled to receive services under these statutes.

Subsequently, the effective date of the interpretation was postponed until March 30, 1981 (46 F.R. 12495; Feb. 17, 1981); a notice of further postponement until May 10, 1981, was published (46 F.R. 18975, Mar. 27, 1981); and a notice of proposed suspension of the interpretation was published (46 F.R. 19002; Mar. 27, 1981).

The last word from the Secretary was to postpone the interpretation until further notice (46 F.R. 25614; May 8, 1981). The published reasons for postponement included:

> "The Secretary is also concerned that the differentiation between related services and medical services

> be clarified. The Secretary declines to issue an interpretation *based on regulations that are ambiguous and subject to review*. 46 F.R. 25614. (Emphasis added.)

As construed and applied by the Courts below, the "delphic" regulations implementing EAHCA and § 504 of the Rehabilitation Act of 1973 go beyond the carefully-worded provisions of the respective statutes, and exceed the powers of the agency(s). The agency(s) have no authority to rewrite the statute(s) by means of regulations, creating duties not contemplated by Congress. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 410, S.Ct. 2361, 2369 (1979); *Pennhurst State School & Hospital* v. *Halderman*, *supra*, at 1540; see also the concurring opinion of Chief Justice Burger, *University of Texas* v. *Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, at 1835, 1836. If the implementing regulations "shed any light" on the intent and meaning of 20 U.S.C. § 1401(17) and 29 U.S.C. § 794, the light doesn't shine on the U.S. Department of Education. Further, looking to state law to interpret an act of Congress short-circuits the system and fails to turn the darkness into light or remove the ambiguities.

Under EAHCA and the Rehabilitation Act, the state agencies are only encouraged to adopt and implement policies and procedures which provide the special needs of handicapped students. The statutes in question clearly reveal Congress knew how to provide for the medical treatment of public school students and how to provide for their educational needs where it wished to do so. The language, purpose, nor history of EAHCA reveal any intent to require the public schools of the respective states to provide medical treatment prescribed by private physicians, much less require them to secure services of trained medical personnel so the physician can delegate the medical treatment desired.

"Medical services" for any purpose other than diagnostic or evaluation are simply not required by the statute. For purposes of diagnosis and evaluation, they may be provided by a licensed physician or a "qualified school nurse or other qualified persons." The implementing regulations cannot require more.

(2) Assuming, arguendo, the regulations properly obligate the School District to provide medical treatment as a "school health service," the District Court was still wrong in ordering the District to modify Amber's IEP to provide the medical treatment prescribed by her physician.

The District Court found the Texas Medical Practice Act sufficiently authorized the physician to delegate the prescribed medical treatment; and, therefore, the School District could provide the prescribed medical treatment without violating the Medical Practice Act. The Court had also found the School District could not lawfully provide the medical treatment unless it and the physician complied with the Medical Practice Act and/or the Nurses Practice Act (Pet. App. 12a-13a). Even with these findings, the conclusion of the Court is still erroneous because it is still not required by EAHCA and its implementing regulations, as "delphic" as they are.

For the School District to lawfully deliver the medical treatment, the "services of a licensed physician" are still required, which are not for diagnosis or evaluation of a handicapping condition; and, thus, the medical treatment is not required. The following "services of a licensed physician" are clearly required, as reflected by the record in this case (Pet. App. 37a-52a):

(1) determine the needs and capabilities of the patient;

(2) determine the training, experience, and competence of the person who will be performing the prescribed treatment;

(3) assume the responsibility for supervision, training, and control of the unlicensed person performing the treatment;

(4) determine if the treatment is properly performed and is progressing without complication;

(5) prepare the prescription and determine its content;

(6) delegate its performance and parameters;

(7) monitor the patient's progress and perform the numerous physician duties discussed in Amicus Brief of Texas Medical Association reprinted as an appendix to the District Court's opinion on remand (Pet. App. 37a).

The Court of Appeals in *Tatro I*, in holding the medical treatment in question to be a "related service," said:

> "*Excluded* from the term 'related services' are those health-related activities which must be performed by a licensed physician that are not provided 'to determine a child's medically related handicapping condition which results in the child's need for special education and related services.' " (Pet. App. 105a) (Emphasis added.)

The District Court found the School District could not lawfully provide the medical treatment, i.e., the "life support services," without the foregoing described services of a licensed physician. Thus, under the Court of Appeals' own definition of "related services," the medical treatment prescribed cannot be a "related service" because of the Court's exclusion of licensed physician services not for diagnosis or evaluation. The physician must prescribe and delegate so the School District can treat the child as prescribed.

Thus it is clear services of a licensed physician are required, and the medical treatment is *excluded* from "related services" by the Court's own definition.

2. Requiring The Petitioner To Provide Respondent Medical Treatment Prescribed By Her Private Physician Is Not Required By EAHCA Or The Rehabilitation Act Of 1973, § 504.

The Courts below read the scope of the rights created by EAHCA and § 504 of the 1973 Rehabilitation Act too broadly, and exceeded their remedial powers in compelling the District to provide medical treatment as might be prescribed by a private, treating physician of a public-school student.

Section 504, the Rehabilitation Act of 1973, as amended 29 U.S.C. § 794, only prohibits discrimination in programs or activities receiving federal financial assistance. Standing alone, it creates no rights nor confers any benefits on the Petitioner's students. The Respondent cannot, solely because of her handicap, be excluded from participation in, or be denied the benefits of, any program or activity operated by the Petitioner for which it receives federal funds. The program or activity in question is asserted to be the Petitioner's educational programs for handicapped students. If medical treatment for Respondent is not required to be provided by Petitioner under EAHCA, it is not required by § 504.

The decision of the District Court and the Court of Appeals, if not reversed, will evade state and local authority in providing a "free apropriate public education" and set standards outside the intent of Congress, contrary to this Court's decision in *Board of Education of the Hendrick Hudson Central School District Board of Education, et al.*, v. *Rowley*.

A "free appropriate public education" is defined in the Act as:

> ". . . special education and related service which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) *meet the standards of the state education agency*, (C) include an apropriate pre-school, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program. . . ." 20 U.S.C. § 1401(18). (Emphasis supplied.)

The definition of "special education" as included above is:

> " . . . specially designed *instruction*, at no cost to parents or guardians, to meet the *unique* needs of a handicapped child, including classroom instruction, instruction in physical education, *home instruction*, and instruction in hospitals and institutions." 20 U.S.C. § 1401(16). (Emphasis supplied.)

The term "related services" means:

> "Transportation and other developmental, corrective, and other supportive services . . . as may be required to *assist* a handicapped child to benefit from *special education*." 20 U.S.C. § 1401(17). (Emphasis supplied.)

The term "individualized education program" means:

> "A written statement for each handicapped child developed in any meeting by a representative of the local educational agency . . . which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child and the extent to which such child will be able to participate in regular educational programs. . . ." 20 U.S.C. § 1401(19). (Emphasis supplied.)

The regulations implementing EAHCA provide that:

> "(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special educational and related services.
>
> "(b) The continuum required under paragraph (a) of this section must:
>
> (1) Include the *alternative placements* listed in the definition of special education . . . (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) . . . ." 34 C.F.R. 300.551. (Emphasis supplied.)
>
> "In selecting the least restrictive environment, consideration is given to any *potential harmful effect* on the child or on the quality of services which he or she needs." 34 C.F.R. 300.552(d). (Emphasis supplied.)

EAHCA recognizes the importance of local decision-making and its requirement that an individual education program be developed for each handicapped child. 20 U.S.C. § 1414(a)(5) and 20 U.S.C. § 1401(19). The educational agency, based upon its expertise in the field of education of handicapped children and upon the "unique" needs of the particular child, develops an individualized education program (IEP) for the child.

Nowhere in EAHCA, nor its legislative history, can it be found Congress intended to require medical treatment be provided so the child can reach "maximum potential" or so the child can receive a "free appropriate public education."

The goal of the educational agency for the particular child may differ depending upon the intelligence level of the child - the goal for a severely retarded child may be to achieve self-sufficiency (a goal which may or may not be

met depending upon the severity of the handicapped) - or where a handicapped child has average or above-average intelligence, the goal of the school system may be to enable the child to go from one grade to another and graduate with an average level of success. *Rowley, supra*, at 3049. The goal for an orthopedic handicapped child may be to develop the fine and gross motor skills to a level of self-sufficiency and refine such skills to the degree the child may be eventually educated in the regular classroom. More than that cannot be required of a public school system with regard to a handicapped child, anymore than it can be required with regard to a non-handicapped child.

The order of the District Court that the educational agencies were to modify Amber's IEP to provide for that medical treatment prescribed by her personal physician in order that Amber receive a "free appropriate public education" was based on the Court's interpretation of regulations implementing EAHCA, and state law governing the practice of medicine and nursing, *but without regard to any assertion or evidence the State Plan for educating its handicapped children was in violation of EAHCA or its implementing regulations.* The effect of the Court's decision is to hold that the handicapped student must be provided whatever medical treatment a doctor chooses to prescribe in order that the student receive a "free appropriate public education." Such holding is contrary to the language, purpose, and history of EAHCA and this Court's decision in *Rowley, supra.*

Congress passed EAHCA in response to the need for increasing funding. Although the Act sets forth general requirements states must meet in order to qualify for receipt of federal funds, it does not prescribe the specific educational programs local schools must make available in order to fulfill those requirements, nor address medical treatment a physician may desire for his patient.

The heart of the federal control mechanism is a system of procedural safeguards which provides for parental involvement in education decision-making. Perhaps the most significant reason Congress failed to prescribe more specific standards is the traditional notion that education is primarily a state and local concern. *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968); *San Antonio School District* v. *Rodriquez*, 411 U.S. 1, 42, 93 S.Ct. 1278, 1301.

Determining what constitutes a "free appropriate public education" is solely the responsibility of state and local educators. Unless the Court finds the procedural safeguards are violated, or the special education and related services set forth in the State Plan violate the federal Act, or the provisions of the State Plan are violated by the local education agency, there is no basis for finding a local educational agency must provide any specific service not included in the Act or the State Plan in order that the child receive a "free appropriate public education."

This Court in *Rowley, supra*, discussed the history and legislative purposes in detail. As the Court said,

> "By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the states any greater substantive educational standard than would be necessary to make such access meaningful." *Rowley, supra*, at 3043.

Once the handicapped child is provided access to the school system, he or she must then be provided services with the goal of achieving self-sufficiency. With regard to Amber Tatro, a pre-kindergarten student, there is no evidence to indicate Amber could not receive occupational therapy, physical therapy, and speech therapy in an educational setting of the early childhood development class or elsewhere, nor that the medical treatment pre-

scribed by her personal physician is necessary for her to receive or benefit from such educational services. There is absolutely no evidence that Amber was denied "access" to the school system.

The District Court and the Court of Appeals, however, would insist upon more. That in order to receive a "free appropriate public education," i.e., specialized instruction to meet her unique needs, the School District must provide the medical treatment prescribed by her doctor in the public schoolroom. Such a standard goes beyond both the "self-sufficiency" and the "equal-opportunity" standard expressed by Congress and discussed by this Court in *Rowley, supra*. Given the concerns expressed by Congress, it is inconceivable that any reliance could be placed on the legislative history of the Act to support a proposition that Congress intended to require school districts to provide sufficient time, money, effort, trained personnel, etc., to assure that every handicapped child is provided whatever medical treatment a doctor may desire in order that the handicapped child achieves his or her maximum potential and be educated in the "regular" classroom as a condition to receiving the funds appropriated by Congress.

Whatever is desired of the substantive content of a "free appropriate public education," Congress believed that compliance with required procedures of the Act would assure much if not all of what was wished in the way of substantive content, *Rowley, supra*, at 3050. Adhering to and following the identification and evaluation procedures, a handicapping condition which adversely affects educational performance is diagnosed. An IEP is then developed which sets forth the "specially-designed instruction" to meet the unique needs of the child, and includes the "related services" required to assist the child to benefit from the "specially-designed" instruction.

When the IEP is developed, an educational setting for the child must be selected from the "continuum of alternative placements" which the local educational agency is required to have available. 34 C.F.R. 300.551. In doing so, it is to consider any "potential harmful effect" on the child of any contemplated placement. Where there is found to exist a substantial risk to the child's health and well-being, an alternative placement must be selected.

The District Court found there existed a risk of serious injury to Amber and that Amber is not required to accept such a risk in order to attend school (Pet. App. 15a). Thus, the Court found a "potential harmful effect" if Amber was placed in the educational setting requested by her parents, i.e., the early childhood classes for two and one-half hours. Rather than order the School District to provide Amber an alternative placement, the Court ordered the School District to modify Amber's IEP and to provide her the medical treatment prescribed by her physician in accordance with the physician's prescription. The Court further ordered the School District to secure the services of persons who are sufficiently trained to enable Amber's physician to prescribe so his prescription can be implemented by the School District (Pet. App. 13a). Such a result is not required in order that Amber receive a "free appropriate public education."

The standard of review by courts of suits brought under § 1415(e)(2) has been established by this Court:

> "First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the Courts can require no more." *Rowley, supra*, at 3051.

As the Court noted:

> "This inquiry will require a court not only to satisfy itself that the state has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of § 1401(19)." *Rowley, supra,* at 3051, n.27.
>
> "In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the states. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." *Rowley, supra,* at 3051.

Certainly, Amber is entitled to "specialized instruction" to meet her unique needs. If the particular setting desired by her parents is found to pose a "potential harmful effect" on the child, alternatives are to be available in order to deliver the "specialized instruction" contemplated in § 1401(16) of the Act. The Act does not require the educational agencies to eradicate the "potential harmful effect," but only to develop an IEP reasonably calculated to enable the child to receive educational benefits.

When the language of EAHCA, its purpose, and history are taken together with the teachings of this Court in *Southeastern, supra; Pennhurst, supra;* and *Rowley, supra,* it is clear no obligation is imposed on Petitioner to furnish and deliver the medical treatment prescribed by private physicians. Applying the standard of review articulated by this Court in *Rowley* can result in only one conclusion: the IEP developed for Amber meets the standards of the state educational agency and provides

her a "free appropriate public education." The State and this Petitioner have complied with the obligations imposed by Congress, and the courts can require no more.

3. The Granting Of Relief Under The Rehabilitation Act Of 1973 Conflicts With Prior Decisions Of This Court.

The District Court found no specific violation of the Rehabilitation Act. However, for reasons of institutional order, it held that 29 U.S.C. § 794a(b) authorized an award of attorney's fees (Pet. App. 32a). The Court of Appeals indicated its reluctance to find a violation of § 504 but felt constrained to follow the decision in *Tatro I* which determined that refusal to provide C.I.C. was a violation of Section 504 (Pet. App. 79a). The decision in *Tatro I* is not entirely clear regarding the finding of a § 504 violation. However, the finding is based either on the proposition that (1) 504 creates an affirmative obligation to provide C.I.C. in the educational arena, or (2) a violation of EAHCA also constitutes a violation of § 504. Petitioner submits that reliance on either proposition is improper.

The District Court in *Tatro I* held that Respondents could not convert a statute prohibiting discrimination in certain government programs to a statute requiring, in essence, the setting up of governmental health care for the people seeking to participate in such programs (Pet. App. 92a). The Court of Appeals in *Tatro I* specifically found that conclusion to be incorrect (Pet. App. 107a). The Court of Appeals in the instant appeal recognized the difficulty of reconciling the finding of *Tatro I* regarding § 504 with this Court's decision in *Pennhurst*, but felt constrained to follow *Tatro I*. Is the original conclusion of the District Court in *Tatro I* incorrect? Petitioner submits that the District Court's original conclusion was correct and that this Court's decision in *Southeastern* and *Pennhurst* specifically support that conclusion.

The Rehabilitation Act is a federal-state grant program. It is voluntary, and the states are given the choice of complying with the Act or foregoing federal funds. This Court has previously determined that neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. *Southeastern*, *supra*, 99 S.Ct. at 2369-70. This Court reiterated this general proposition as it relates to funding statutes in *Pennhurst*, stressing that Congress understood that accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so. *Pennhurst*, *supra*, 101 S.Ct. at 1545. Simply stated, the language of § 504, which generally prohibits discrimination in federally funded programs, cannot be read to create an affirmative obligation to provide medical treatment to handicapped children to avoid general health risks. If the basis of the Court of Appeals' finding of a violation of § 504 in *Tatro I* was that such an affirmative obligation was created, such decision was erroneous and remains so. The reliance of the Court of Appeals in this appeal on the decision in *Tatro I* is, therefore, erroneous and in conflict with this Court's decision in *Southeastern* and *Pennhurst*. Furthermore, if the obligation can somehow be argued to have been created through the implementing regulations, then such regulations constitute an unauthorized extension of the obligation imposed by the Rehabilitation Act. *Southeastern*, *supra*, 99 S.Ct. at 2369. Therefore, the decision of the Court of Appeals, if based upon such unauthorized regulations, would be erroneous.

Therefore, even if an implied private right of action exists in favor of Respondents under § 504, no violation occurred; and the award of attorney's fees was erroneous.

The only alternative to reliance on the creation of affirmative action obligations by the Rehabilitation Act by the Court of Appeals in finding a § 504 violation can be the proposition that a violation of EAHCA automatically constitutes a violation of § 504. Respondents' statutory claim under § 504 arises from the same factual underpinnings as the claim under EAHCA. The Court of Appeals in *Tatro I* determined that failure to provide C.I.C. amounted to exclusion under § 504 since the child could not attend school without the procedure (Pet. App. 108a). However, this determination was based on assumed facts and the Court's assumption that C.I.C. would not create an undue burden, as would kidney dialysis, and thus run afoul of this Court's decision in *Southeastern* (Pet. App. 109a). The Court, however, failed to recognize that regardless of costs or administrative burdens, if the procedure is required by the EAHCA, it must be provided at no cost. Thus, a paradox arises. A procedure which would be extremely costly and create undue burdens would not be required by § 504 by virtue of *Southeastern*. However, it would still be required by the EAHCA since the special education and related services are required to be provided at public expense regardless of cost or burden. The argument that the EAHCA remedies are exclusive, therefore, becomes apparent. In *Smith* v. *Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983) writ granted, ___ U.S. ___, the Court held that § 504 of the Rehabilitation Act is a general prohibition against discrimination and does not specifically apply to the education of handicapped children. 703 F.2d at 9. In view of *Pennhurst* and other cases questioning the existence of a private right of action under § 504, the Court in *Smith*, recognizing the comprehensive remedial scheme of the EAHCA, rejected the allowance of attorney's fees pursuant to the Rehabilitation Act in a case factually depen-

dent on the EAHCA. The Seventh Circuit reached the same result in *Timms* v. *Metropolitan School District of Wabash County*, 718 F.2d 212 (7th Cir. 1983), determining that in view of *Rowley*, the EAHCA is the exclusive remedy. Therefore, if the finding of a § 504 violation in *Tatro I* was based on non-exclusivity as opposed to a determination that affirmative obligations were created by the Rehabilitation Act, such conclusion was erroneous. The Court of Appeals in the instant appeal relied totally on *Tatro I* in affirming the attorney's fees award under § 504, and such decision is also erroneous. Regardless of the basis for the finding of a § 504 violation, such finding by the District Court and Court of Appeals was erroneous.

CONCLUSION

The District Court and the Court of Appeals should have dismissed the complaint when Respondent failed to assert and/or establish the State Plan violated the Act, that Petitioner had violated the State Plan, or that the IEP did not meet the standards of the State Educational Agency. The definition of "related services" formulated by the Court of Appeals and, on remand, applied by the District Court and affirmed by the Court of Appeals was unnecessary, unworkable, and in derogation of legislative intent and prior decisions of this Court. In ordering provision of medical treatment and securing trained personnel so the private physician can prescribe and delegate whatever medical treatment he wants for his patient, when he wants it, the District Court failed to consider the services of the licensed physician that were required. The Court of Appeals affirmed for the reasons set forth in a prior

decision of the Court, in disregard of subsequent decisions of this Court.

Wherefore, Petitioner respectfully requests that this Court reverse the judgment of the Court of Appeals and dismiss the complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief for Petitioner on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit of Irving Independent School District, Petitioner, have been delivered by Certified Mail, Return Receipt Requested, to Mr. James C. Todd, Advocacy, Incorporated, 5555 North Lamar, Suite K-109, Austin, Texas, 78751, this the 18th day of January, 1984.

James W. Deatherage